STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 16, 2003
v	No. 239511 Jackson Circuit Court
BARRY ROBERT SWEET, Defendant-Appellee.	LC No. 01-005781-FH

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order dismissing the charge against defendant of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). We reverse and remand for proceedings consistent with this opinion.

I. Facts and Procedural History

The testimony from the evidentiary hearing established that the police witnesses and defendant had, at times, varying accounts of what occurred in the early morning hours of June 29, 2001. Because the trial court did not make any detailed findings of fact on several key issues, we set forth both versions of events.

A. Police Version of Events

On June 29, 2001, Officer Mark Easter stopped an individual for a traffic offense sometime before 3:00 a.m. Easter received information from that individual regarding a residence that possibly had marijuana, and decided to perform a "knock-and-talk" with the residents in order to try and obtain consent to search the residence. Based on the information obtained during the traffic stop, Easter believed that there was a large quantity of marijuana in the residence. Based on the individual's description of the residence, Easter went to a residence on Ganson Street because it had a boat in the front yard. The individual indicated that the residence was an apartment building. Easter requested Officer William Mills to come with the K-9 unit in order to search a vehicle; however, Mills ended up assisting Easter once at the residence.

The front door of the residence was glass with wood trim. There were no lights on inside the residence, and the officers shined a light through the door. Easter testified, "There was a

door off to the left, one directly in front, and a stairway, which I believe that led to another door to the right." Easter did not knock on the front door, but walked in the residence because he believed the exterior door led to other apartments. There was no deadbolt on the front door, and the front door was not locked. Easter indicated that he believed the residence was an apartment building because of the number of doors, the types of locks on the doors, and the fact that there was a peephole on one of the interior doors. Mills testified that he believed the residence was an apartment building because there was no deadbolt lock on the front door, one of the interior doors had a peephole, and there was no personal property in the hallway of the building.

Once inside, Easter approached a door to the left, and Mills went to the door that was straight ahead. Easter and Mills observed that one of the doors on the first floor was slightly opened. Mills was able to look inside the door without touching or moving the door. Easter flashed his light in the door, peered through the door, and saw a green leafy substance he believed to be marijuana along with a handrolled marijuana cigarette in an ashtray. Additionally, Mills also saw what he thought was a marijuana cigarette sitting in the ashtray.

Mills began knocking several times, and defendant eventually came out of a door on the second floor and asked Mills what he was doing. Easter asked defendant if his name was "Barry," and defendant replied affirmatively. Defendant informed the officers that he was living in both the upper and lower level apartments, and the officers asked defendant to come downstairs and talk to them. Easter asked defendant to go inside the room to sit down and talk. Defendant agreed to speak with the officers, and allowed the officers to enter the living room area of the lower level apartment.

Mills picked up the rolled cigarette, smelled it, and determined that it was marijuana. Mills asked defendant if the marijuana was his, and defendant replied affirmatively. Defendant first entered the room and sat down in a chair. Easter and Mills told defendant that he had been advised that defendant had large quantities of marijuana in the residence. Defendant told Mills that there was marijuana in the refrigerator. Mills went to the refrigerator and returned with a small bag of marijuana that was located on a shelf in plain view. Mills told defendant that he believed there was more marijuana. Defendant informed Mills that there was more marijuana in the vegetable bin of the refrigerator, and Mills retrieved two one pound bags of marijuana from the refrigerator.

After Mills retrieved the marijuana, the officers asked defendant for consent to search the remainder of the premises, and defendant signed a consent to search form. No other contraband was found on the premises aside from that located in the ashtray and refrigerator. According to Easter, defendant never told the officers not to enter the house or not to go into the refrigerator. Additionally, Easter testified that defendant did not tell the officers to enter the premises or to leave the premises. Mills indicated that defendant never told him to leave the premises, or that he was unwanted or uninvited.

B. Defendant's Version of Events

Defendant testified that he was the only person living in the house on June 29, 2001. Defendant did not give the police permission to enter his house, and testified that he was "fast asleep." Defendant admitted that the door with the peephole was open approximately six or seven inches; however, defendant testified that "there was no way you could see through that

door from the street." Defendant testified that he was awakened by the police "pounding on the wall in the foyer," and that he "woke up and opened the door at the top of the stairs to see what was going on." The police asked defendant his name, and defendant stated that the police "wanted [defendant] to come down and talk to them." Defendant was very surprised to see the police in his house, and testified that he had not given them permission to be there. According to defendant, he "came downstairs to see what was the problem," and the police "said they were told [he] had some marijuana in the house." As defendant came down the stairs, Easter had the door wide open, and was "pushing it back shut." Defendant testified that when he was in the foyer, he asked the police to leave his house:

> Oh, I asked them once; how it was put, they said they wanted to go in the next room and talk about this. And I said I don't, we can talk about it right here. I said, actually, we can talk about it on the porch.
>
> And again they told me, we want to go in that room. I said I don't. I said it one more time. He stepped forward, crossed his arms like he is now. The other put his hands on his hips, stepped in in [sic] a threatening manner, so I said to them, fine, in a very sarcastic manner.
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> ***
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> I opened the door, walked in the room. I was going to go across the room, to sit on my own couch. This time, Officer Mills said, oh no, you have to sit right there, and sort of tweaked at my shoulder and pushed me toward the chair.

Defendant testified that at that point, he did not feel that he could leave. The police officers began questioning defendant, and defendant "felt like [he] was kidnapped in [his] own home. [He] wasn't free to move about." According to defendant, the police only asked for consent to search his house after it had already been searched. However, on cross-examination, the prosecutor and defendant engaged in the following colloquy:

> *Q*. You expressed that that was your preference; did you ever ask them specifically to leave your residence?
>
> *A*. No, I did not use the words to get out or leave my home, no.

Defendant admitted that the police never mentioned or drew their weapons, and that the police were merely holding flashlights.

C. Trial Court's Findings

After closing arguments by both sides, the trial court stated:

> You know, I've never heard of this, I don't think I've ever heard this knock-and-talk procedure. Not a bad idea, I guess. But, you know, as I've been hearing the testimony here, I've been thinking about the matter, and, you know, I think we have to look at all the circumstances of this case, not just of what happened in any particular area.

The trial court focused on the fact that the knock-and-talk occurred at 3:00 a.m., and that in its opinion, the subject of the knock and talk, marijuana, is not particularly dangerous:

> The officers feel that they got some information that this man maybe had some – [defendant] maybe had some marijuana. It's three o'clock in the morning. Marijuana is not particularly, you know, it's not a bomb, or it's not the most dangerous thing in the world, though I think it is dangerous, but it's illegal.
>
> But do we go into people's homes and roust them up at three o'clock in the morning to talk to them about whether or not they have marijuana? Is that the kind of procedure that our police are going to undertake?

The trial court concluded: "No. We don't do business that way. This stinks, gentlemen. This search was unlawful, it was unnecessary. It should never have happened, and the Court is granting the motion." The trial court then dismissed the charge against defendant with prejudice.

II. Analysis

The prosecution argues that the trial court erred in granting defendant's motion to suppress and in dismissing the charges against defendant, because the trial court did not make a determination regarding whether the police action in this case was lawful under the Fourth Amendment to the U.S. Constitution, i.e., whether defendant was seized or whether defendant consented to the search. We agree.

This Court reviews a trial court's factual findings in a suppression hearing for clear error, and we will affirm those findings unless we are left with a definite and firm conviction that a mistake has been made. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, this Court reviews de novo the trial court's ultimate ruling on a defendant's motion to suppress. *Id*.

The sole issue for us to resolve is whether the trial court was correct in finding the police contact with defendant and subsequent seizure of the marijuana to be unlawful because it occurred at 3:00 a.m. in defendant's house. In resolving this issue, we first turn to our recent decision in *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001), where we upheld the constitutionality of the "knock and talk" procedure utilized by police in this (and that) case. In *Frohriep*, we noted:

> Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality of illicit items. See, e.g., *United States v Hardeman*, 36 F Supp 2d 770, 777 (ED Mich, 1999); *State v Smith*, 346 NC 794, 796; 488 SE2d 210 (1997); *United States v Zertuche-Tobias*, 953 F Supp 803, 829 (SD Tex, 1996). [*Frohriep*, *supra* at 697.]

We then went on to conclude, consistent with other cases on this issue, that the occurrence of a "knock and talk" between police and an individual does not alone implicate the constitutional safeguards afforded individuals in the criminal context:

> We conclude that in the context of knock and talk the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections. It is unreasonable to think that simply because one is at home that they are free from having the police come to their house and initiate a conversation. The fact that the motive for the contact is an attempt to secure permission to conduct a search does not change that reasoning. We find nothing within a constitutional framework that would preclude the police from setting the process in motion by initiating contact and, consequently, we hold that the knock and talk tactic employed by the police in this case is constitutional. [*Id.* at 698 (footnote omitted).]

We also decided, however, that police conduct must still be examined under ordinary Fourth Amendment jurisprudence to determine if a search or seizure occurred, and if so, whether either was unlawful. *Id.* at 698-700.

The United States and the Michigan Constitutions both prohibit unreasonable searches and seizures. US Const Am IV; Const 1963, art 1, § 11. "A 'seizure' occurs within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding an encounter with the police, a reasonable person would have believed that the person was not free to leave." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). The reasonableness of a search depends on a balancing of the need to search against the intrusion the search entails. *People v Wallin*, 172 Mich App 748, 750; 432 NW2d 427 (1988).

In the instant case, the trial court did not make any cogent findings of fact, and instead stated on the record its conclusion that the "knock and talk procedure" was "not a bad idea," but that, based on the time of the encounter, the "search was unlawful" because "[w]e don't do business that way." The court also seemed concerned that one other resident lived in the dwelling. We believe that the trial court erred in relying almost exclusively on the time of the "knock and talk" as a basis for its ruling, and therefore reverse.

As the *Frohriep* Court noted, many courts have indicated that there is ordinarily no coercive aspect to a "knock and talk" performed by police officers on private property. *Frohriep, supra* at 697-698; see also *United States v Cormier*, 220 F3d 1103, 1109 (CA 9, 2000), and cases cited therein. Police, like any other member of the public, are free to "walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant . . . ." *Davis v United States*, 327 F2d 301, 303 (CA 9, 1964).

Although they are free to approach a home and seek to question the occupant, as noted in *Frohriep*, courts must still determine whether, under Fourth Amendment principles, consent to the entry and any subsequent search was voluntary or whether there was an unlawful seizure of the individual because of coercive police conduct. *Frohriep, supra* at 699-703. In doing so, courts have considered the type and amount of knocking done by police, *United States v Jerez*, 108 F3d 684, 705 (CA 7, 1997) (Coffey, J., dissenting), whether there were police demands to open the door, *United States v Winsor*, 846 F2d 1569, 1573 n 3 (CA 9, 1988), and the time the

officers knocked on the door. *Aaron Scott v State*, 366 Md 121, 133-138; 782 A2d 862 (2001). However, as the Maryland Court of Appeals noted in *Aaron Scott*, no court has held that a "knock and talk" is coercive as a matter of law solely because of the time it takes place, and to do so would require implementation of a judicially created bright-line rule, which would be, by its very nature, unprincipled and unworkable. *Id.* at 138. Instead, the ultimate inquiry "is whether a reasonable person in the same circumstances would have felt free to decline the officers' request to search." *John Scott v State*, 347 Ark 767, 778; 67 SW3d 567 (2002).[1]

In the instant case, the trial court's ultimate conclusion that there was an unlawful seizure did not entail any findings of fact or conclusions of law relative to a Fourth Amendment analysis regarding the reasonableness of the police conduct and whether defendant consented to the police questioning and search. *Frohriep, supra*. Instead, the court seemed to rely almost exclusively on the time of the police encounter, which is a factor, but not an exclusive factor, used to determine the reasonableness of an encounter. On remand, the trial court should consider all of the pertinent factors in determining whether defendant consented to the search or whether the police acted in such a manner so as to constitute an unlawful seizure of defendant. Accordingly, we reverse the trial court's order suppressing the evidence and dismissing the charges, and remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

[1] This inquiry is stated slightly differently than the "not free to leave" standard set forth in *Shankle, supra,* in recognition of the fact that this encounter took place in defendant's residence, where he likely had no desire to leave. *John Scott, supra* at 777-778, relying on *Florida v Bostick,* 501 US 429; 111 S Ct 2382; 115 L Ed 2d 389 (1991) and *Michigan v Chesternut,* 486 US 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988).